No. 198

In the Supreme Court of the United States

OCTOBER TERM, 1945

M. KRAUS & BROS., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

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OPINION BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 326–332)[1] have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 31, 1945 (R. 333). The petition for a writ of certiorari was filed July 5, 1945. The jurisdiction of this Court is invoked under

[1] The dissenting opinion was predicated solely upon the exclusion of testimony, which is considered at pp. 6–7, *infra*.

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Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a device, whereby poultry is sold only in combination with undesired chicken feet, skin or gizzards, is an evasion of established maximum prices.

2. Whether the corporation which received the proceeds of such combination sales was criminally liable for the acts of its employees in making the sales.

3. Whether the trial court's refusal to permit defense counsel to examine affidavits used by the Government to impeach its own witnesses constituted reversible error, where such prior statements were used only in an attempt to establish the personal participation of petitioner's president, who was acquitted.

4. Whether the Government counsel's erroneous statement in his summation in respect of the maximum fine which could be imposed constituted reversible error.

STATUTE AND REGULATION INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provided in pertinent part:

SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

Revised Maximum Price Regulation No. 269, issued December 18, 1942 (7 Fed. Reg. 10708), and reissued with amendments on October 8, 1943 (8 Fed. Reg. 13813), provides in pertinent part:

SEC. 1429.5. *Evasion.*—Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities

prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise.

STATEMENT

Two informations, each in six counts, were returned against petitioner in the United States District Court for the Southern District of New York.[2] Each count charged a willful violation of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 269, Section 1429.5, in that, as an integral part of the sale of a specified amount of poultry, on a specified date in November 1943, petitioner demanded, compelled, and required the buyer to purchase an additional commodity, variously described as chicken feet, chicken skin, or gizzards, at a specified price, as a condition of the sale of the poultry. (R. 3–13.) The two informations were consolidated for trial (R. 14). Count 5 of the first information was dismissed at the close of the Government's case (R. 185), and petitioner was acquitted on counts 1 and 2 of the second information (R. 286). It was convicted on the other counts and fined $2,500 on each, or a total of $22,500 (R. 286, 290).

[2] Petitioner's president was named as a codefendant in one information, but he was acquitted (R. 3–7, 286).

On appeal, the judgment was affirmed, one judge dissenting (R. 332, 333).

The evidence for the Government consisted of the testimony of the retail butchers named in the various counts of the information that in the period from November 22 to 24, 1943, immediately prior to Thanksgiving, they called for poultry at petitioner's wholesale establishment, and that boxes of chicken feet, skin, and gizzards, which they had not ordered, were loaded on their trucks (R. 70, 83, 85, 90, 102–103, 129–130).[3] The purchasers were billed for the poultry at ceiling prices and separately for the feet, skin, etc. (R. 71–72, 82–83, 90, 132, 165–166). All except one hostile witness (see R. 103–106) testified that they had little or no demand for the feet, gizzards, etc. (R. 68, 83, 86–88, 126, 169, 175) and that the greater part of these items so purchased was given or thrown away (R. 72, 84, 93, 132, 179).

ARGUMENT

1. Petitioner contends (Pet. 2–3, 9, 10–11) that the evidence did not establish an evasion of the maximum price regulation for the reason that a combination or "tie-in" sale, whereby a scarce commodity is sold only in conjunction with a

[3] Testimony of one witness disclosed a slight variation in that he stated he was asked on two occasions whether he could use chicken skin or feet and he replied that he would take some (R. 168, 174). But this witness further testified that he had never bought chicken feet or skin before (R. 169, 175).

slower moving product, is not illegal if the secondary product is sold at a fair price. Similarly, it contends that it was reversible error for the trial judge to limit the testimony offered by petitioner as to the existence of a market for chicken feet, skin, etc.

It is obvious, however, that a dealer who must purchase a secondary product for which he himself has no demand, in order to get a scarce product he desires, is, in fact, paying more than ceiling prices for the scarce commodity, whether or not the secondary commodity can be sold by some other person supplying a different type of trade, and, however fair the price. The combination sale is thus, in fact, an evasion of established maximum prices. See *United States* v. *Armour & Co. of Delaware,* 50 F. Supp. 347, 349 (D. Mass.); *Bowles* v. *Cudahy Packing Co.,* 58 F. Supp. 748 (W. D. Pa.), where "tie-in" sales of eggs (clearly a marketable commodity) with butter were held to be violations of maximum price regulations. See also *Brown* v. *Banana Distributors,* 52 F. Supp. 804, 805 (D. Conn.).

Hence, we submit that the trial judge would have committed no error had he adhered to his original ruling excluding testimony offered by petitioner "to show that there is and has been a demand for chicken skins, chicken feet, gizzards * * * that they are dealt and traded in" (R. 189), on the ground that "the only thing we are concerned with is whether or not the witnesses

who testified purchased chicken feet to meet a demand in their stores" (R. 190). In fact, however, the judge did not wholly exclude such evidence. When petitioner's president took the stand in his own behalf he was cross-examined as to the existence of a market for chicken skins, etc. (R. 213–217), and thereafter the witness whose testimony had previously been excluded (R. 188–190) was recalled and allowed to testify that there was a retail market for chicken feet (R. 226–228). Petitioner made no further attempt to call any other witnesses to testify on this subject, although there was an over-night adjournment after this witness was allowed to testify and before the close of defendants' case (R. 15, 250). According to the statement of petitioner's counsel at the time the evidence was first offered, the testimony of the additional witnesses whom he had originally intended to call would have been merely cumulative (R. 190–191). There is thus no foundation for any claim that reversible error resulted from the exclusion of evidence, as contended by petitioner and held by the dissenting judge (R. 332).

2. The contention (Pet. 3, 9, 11–12) that petitioner should not have been held liable for the acts of its employees is untenable. Petitioner's president admitted on the stand that the employees selling the secondary products were acting on behalf of the corporation and that the corporation received the proceeds of such sales (R. 212–213, 217–218, 220–221). Corporate responsibility is

therefore clear. *New York Central Railroad* v. *United States,* 212 U. S. 481, 492–496; *Bowles* v. *Lee's Ice Cream Co.,* 158 F. 2d 113 (App. D. C.); *Minnisohn* v. *United States,* 101 F. 2d 477–478 (C. C. A. 3); *Zito* v. *United States,* 64 F. 2d 772, 775 (C. C. A. 7).

3. Two witnesses for the Government were asked about their dealings with Max Kraus, president of petitioner, who had been named as a defendant in one of the informations (R. 3–7), and both denied any transactions with Kraus personally (R. 105, 132). The witnesses were then shown signed statements given by them to O. P. A. investigators, and were questioned further about their conversations with Kraus, but both persisted in their denials that Kraus had participated in the sales of chicken feet, etc., to them (R. 105–112, 132–141, 153–158, 160–162). Kraus was acquitted by the jury (R. 286). When the statement was shown to the first witness by government counsel, petitioner's attorney requested leave to examine it. The trial judge denied such permission, stating, "I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done." (R. 107.)

We agree with petitioner (Pet. 12) and with the court below (R. 328–330) that the trial judge erred in stating that he had no discretion to permit examination of the statements. See *Goldman* v. *United States,* 316 U. S. 129, 132; *United States*

v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 231–237. In the present posture of the case, however, the error, if any, was immaterial. The statements were used solely in an attempt to establish Kraus's personal complicity, and his acquittal renders the question academic. Furthermore, even if the trial judge's action might have affected petitioner, it could not have been prejudicial, for, as the circuit court of appeals indicated (R. 330–331), the witnesses' testimony, which contradicted their pretrial statements concerning their dealings with Kraus personally, was favorable to him and, hence, to petitioner.

4. In his closing argument, government counsel stated that he thought the defense had resorted to a shabby trick in referring to the possibility of a five-year prison sentence when there was no likelihood that any such sentence would be imposed. He stated, "That is none of your business, none of mine, that is, the jail sentence involved. * * * The maximum for each count in this court on this charge is one year in jail and a $1,000 fine * * *." (R. 270.) The maximum fine is, in fact, $5,000 (*supra*, p. 3).

Petitioner argues (Pet. 4, 10, 13) that this mistake on the part of the Government's counsel constituted reversible error. There is no merit in this contention. At the very opening of his charge to the jury the trial judge told them: "You will make up your minds solely and wholly on what you find the testimony to be. You are not to consider the

penalty or the possible penalty in this case. Both lawyers, in my opinion, should not have told you about it." (R. 273.) Furthermore, it is clear from the reference to imprisonment that the discussion of penalties related to the individual codefendant who was actually acquitted by the jury.

CONCLUSION

The decision below is correct. The case presents no conflict of decisions or questions of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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